STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TOMMIE R. DEES, Charging Party, v. CALIFORNIA STATE UNIVERSITY, HAYWARD, Respondent.	)	Case No. SF-CE-192-H PERB Decision No. 607-H January 2, 1987

Appearance: Tommie R. Dees, on his own behalf.

Before Morgenstern, Burt and Porter, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by Charging Party of the partial dismissal of his first amended unfair practice charge against Respondent, California State University, Hayward (CSUH), and his appeal of the partial refusal to issue a complaint and dismissal of the second amended charge. In an effort to resolve all outstanding issues before it, the Board has agreed to consolidate in one decision Dees' two appeals.

I. THE APPEAL OF PARTIAL DISMISSAL OF THE FIRST AMENDED CHARGE

Of 14 separate allegations gleaned by the general counsel from Charging Party's filings, a complaint issued on two and the others were dismissed, either for untimely filing or for failure to state a prima facie case.

On appeal, Charging Party requests that the case be remanded, with instructions to the general counsel to assist him in articulating his allegations so as to satisfy the requirements of a prima facie case. With regard to the allegations found untimely, Charging Party asserts that the limitation period was tolled by his efforts to resolve those matters through the contractual grievance machinery. The appeal also asserts that the general counsel failed to consider all of the allegations set out in the charge.

For the reasons that follow, we affirm in part and reverse in part the general counsel's partial dismissal of the charge.

PROCEDURAL HISTORY

Tommie Dees filed his original charge on May 21, 1984. The general counsel responded on August 2, 1984 with a letter informing Dees that his charge, as framed, did not state a prima facie case. The letter provided a detailed explanation of the requirements of a prima facie case and invited Dees to amend his charge. Dees filed an amended charge on August 21, 1984. The general counsel's subsequent letter partially dismissing the charge is dated September 7, 1984.

From the amended charge, the general counsel identified the following 14 allegations of unlawful conduct, all in the nature of reprisals for engaging in activities protected by the Higher Education Employer-Employee Relations Act (HEERA or Act):[1]

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references

1. On or about June 7, 1983, Respondent, acting through its agent Tony Rodriguez, took adverse action against Charging Party by keeping Charging Party under personal observation, rather than allowing his leadworker or supervisor to do their normal work duties. This type of reprisal continued on a regular basis until Charging Party was forced to take sick leave in October 1983.

2. On or about June 24, 1983, Respondent, acting through its agent Tony Rodriguez, had Charging Party "written-up" because Charging Party was out of his area of work attending a grievance hearing regarding a physical threat by Mr. Ruiz (CSU supervisor).

3. On or about June 27, 1983, while Charging Party was on his regularly scheduled break at 1.30 [sic] p.m., Mr. T. Rodriguez, ground supervisor for Respondent, saw him and demanded to know why he was out of his area. Mr. Rodriguez chased Charging Party and threatened to "write him up" for insubordination and being out of his area of work.

4. On or about October 11, 1983, Laverne Diggs, Labor Relations Specialist for Respondent, walked out of a Level III grievance meeting while Charging Party was still providing testimony. Both Charging Party and union steward, Gale Pemberton objected to Ms. Diggs' action.

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herein are to the Government Code.

Section 3571 provides, in relevant part:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Subsequently, Laverne Diggs denied this grievance.

5. On or about October 11, 1983, Charging Party received notice that he was being transferred effective October 18 by Respondent into another area (Science Building) which Charging Party considers unsafe. Charging Party's doctor agrees that this area is not safe for Charging Party, yet Respondent refuses to transfer him back to the Administration Building. To date, Respondent has not provided Charging Party with reasonable accommodation by placing him in a safe area. This issue is presently before CSU as a Level III grievance filed by the California State Employees Association (CSEA) on April 16, 1984. The Level I grievance on this issue was denied by CSU on February 21, 1984; the Level II grievance on this issue was denied by CSU on March 28, 1984.

6. On or about October 18, 1983, Charging Party was placed on medical leave by his doctor due to the stress of the new work site from the October 11, 1983 transfer. Employer knew that Charging Party was on medical leave, yet Charging Party was placed on AWOL (leave without pay) which was subsequently changed to sick leave on January 11, 1984 after a grievance was filed by the California State Employees Association.

Mr. Rodriguez (supervisor at CSU) acknowledged at the October 27, 1983 staff meeting that he had forgotten that he was told of Charging Party's medical absence; yet Respondent met through the second level of the contract grievance procedure before it agreed to convert the AWOL time to medical leave.

7. On October 26, 1983, Charging Party was officially placed on sick leave by Respondent as CSU determined Charging Party could not work despite his doctor's letters to the contrary. Thus, Charging Party was forced to use his medical leave.

8. On October 12, 1983, November 1, 1983, and November 11, 1983, and continuing to the present time, Charging Party has been forced to provide medical statements verifying that Charging Party can work. His only limitation is that it be a reasonably secure area.

9. On November 10, 1983, Tony Rodriguez and Mario Ruiz (supervisors at CSU) provoked and exacerbated Charging Party's stressful condition by sneaking up behind Charging Party and physically harassing him. They laughed at Charging Party when he reacted to their knowing attempt to physically harass him. Prior to this incident, Charging Party had been on medical leave from November 1-8, 1983, because of stress and the employer had knowledge of Charging Party's stressful condition.

10. On November 10, 1983, Charging Party was again placed on medical leave by his treating physician following the provocation described above.

11. On December 13, 1983, two letters from the University were sent to Charging Party at the wrong address, one postmarked November 30, 1983, and the other postmarked December 12, 1983. Each letter stated that a meeting was to be held at a different time, thus confusing Charging Party.

12. Charging Party alleges that it is not proper for State Compensation Insurance Fund material to be placed in his personnel file for anyone to inspect. Charging Party requests that CSU remove the Workers' Compensation material from his personnel file.

13. On December 22, 1983, Respondent refused to meet with Charging Party and his union representative, Marilyn Sardonis, regarding the grievances as they had previously agreed in a letter. At that time, Mr. Lindemon, Personnel Officer for CSU, agreed to respond in writing the reason for his refusal to meet with the union

regarding the grievances. Mr. Lindemon has failed to respond to date.

14. On or about March 8, 1984, Respondent sent a letter to Charging Party demanding to know whether he was (1) to be placed on unpaid leave status; (2) return to work; or (3) terminate his employment with CSU.

The general counsel issued a complaint based on allegations 5 and 6, dismissed allegations 1, 2, 3, 4, 7, 9 and 10 as untimely, and dismissed allegations 8, 11, 12, 13 and 14 for failure to state a prima facie case.

DISCUSSION

Charging Party's Request for Assistance

Charging Party made a written request for assistance in a letter dated May 17, 1984, presumably attached to his original charge of the same date. On appeal, he requests that the case be remanded and that he be given assistance in drafting his charge.

There are two PERB Regulations[2] which pertain to assistance in unfair practice charge cases. Regulation 32620(b)(l) requires the Board agent to assist the charging party in properly filing the charge in accordance with Regulation 32615. Regulation 32615 requires that a charge contain certain information, including the names and addresses of the parties, a clear and concise statement of the facts alleged to constitute an unfair practice, and whether a

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2pERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

memorandum of understanding exists between the parties. The assistance required by Regulation 32620(b)(l) is thus best characterized as "technical" and is limited to facilitating proper adherence to Board procedures. There is nothing in the record which reflects that Charging Party here did not receive such assistance. While arguably the statement of facts could be more "clear and concise," the charge was properly filed in accordance with Regulation 32615. Actual drafting of the charge for Charging Party, or other "legal" assistance, is not contemplated by Regulation 32620(b)(l).

However, Regulation 32163 does provide for "legal" assistance in exceptional circumstances:

> If a party is unable to retain counsel or demonstrates extenuating circumstances, as determined by the Board, a Board agent may be assigned to assist the party in accordance with Board policy.

It is instructive to note that, by its terms, Regulation 32163 is discretionary, not mandatory. Thus, it provides no entitlement to legal assistance, and the decision to provide legal assistance lies solely in the sound discretion of the Board. Board policy underlying Regulation 32163 was outlined in Los Angeles Unified School District et al. (1984) PERB Decision No. 396-H, at pp. 6 and 7.

> In determining appropriate policy in this area, we are guided by the statutory scheme of the Acts which we administer. [Footnote omitted.] Unlike both the National Labor Relations Board and the Agricultural Labor Relations Board, this agency is not structured to prosecute cases on behalf of

> charging parties. Rather, the parties themselves are fully responsible for the preparation and presentation of their cases. Thus, the Board's discretion to grant legal assistance is properly exercised with the utmost restraint.
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> Such determination must be made on a case-by-case basis, considering, at a minimum, the abilities and experience of the party requesting assistance, the difficulty and complexity of the case, and the public interest in resolution of the issues involved therein.

We conclude that the instant case is not one in which legal assistance should be provided. We recognize that lay persons unable to retain counsel[3] may be handicapped by their lack of legal training in drafting "clear and concise" charges. However, lay persons should be able to accurately describe the facts and circumstances which support their claims. Regulation 32163 was not intended to provide all unrepresented lay persons with legal assistance. Given the statutory scheme under which the PERB operates, it is clear that the legal assistance provided by Regulation 32163 represents a very narrow exception to the normal burden on the parties themselves to be fully responsible for the preparation and presentation of their cases.

Dees' statement of facts supporting his charge is voluminous and not well organized. However, Dees did an

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[3]Dees in fact did receive some assistance from private counsel, albeit, prior to filing his charge. He also had the benefit of his union's prior efforts in articulating descriptions of most of the same events in the context of filing grievances.

adequate job of describing all adverse acts and conduct which he asserts violate the Act. The sufficiency of his charge can be accurately judged upon the information he has provided. It is very unlikely that careful drafting of the charge could save any of the allegations that would otherwise fail. Thus, the instant case does not reflect the type of extenuating circumstances which compel the extension of legal assistance pursuant to Regulation 32163.[4]

Identification of All Alleged Violations

A careful reading of the amended charge reveals that the dismissal letter does not reflect all of Dees' factual allegations. However, these omissions are, for the most part, nonprejudicial.

Dees alleged various contract breaches based upon proposals dealing with working conditions contained in the minutes of a groundskeepers' meeting led by Supervisor Tony Rodriguez. However, no contract breach (and, therefore, no independent violation of the Act) occurred, for the proposals were withdrawn before implementation when the exclusive representative objected that they would violate the contract. Dees also made general allegations of poor working conditions for all groundskeepers. Without further allegations that such

[4]It should be noted that, in the Board agent's August 2, 1984 warning letter to Dees, she provided a clear and detailed explanation of the requirements of a prima facie case and of the existing deficiencies in the original charge.

conditions were somehow discriminatory or interfered with protected rights under HEERA, there can be no violation of the Act.

More troubling is the general counsel's failure to evaluate allegations based on events prior to June 3, 1983, the date of Dees' first formal grievance. The general counsel presumably concluded that no protected activity prior to June 3, 1983 was alleged, so no reprisal could have occurred. However, the amended charge appears to assert that Dees engaged in other forms of arguably protected activity, chiefly by complaining about the groundskeepers' working conditions, for which he was harassed and intimidated. Again, there was no prejudice, for any charge based on these events would be untimely for the following reasons.

Most of the events prior to June 3, 1983 were never the basis for any grievance filed by Dees, nor was there any other possible basis for tolling the six-month statute of limitations.[5] (Dees' original charge was filed May 21,

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[5]HEERA section 3563.2 provides, in relevant part:

> . . . . . .
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> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the Charge.

(See discussion of equitable tolling at footnote 6, p. 12.)

1984.) The remaining allegations from this period were the subject of Dees' June 3 and June 10, 1983 grievances. The former was resolved in Dees' favor on or about June 10, 1983. The latter was won in part and denied in part, the final denial (at level III) coming on October 17, 1983, and the union's final decision not to arbitrate coming on or about November 12, 1983. Consequently, any tolling effect from the June 3 and June 10, 1983 grievances was insufficient in duration to make the allegations timely.

There are three alleged incidents occurring after Dees' June 3, 1983 grievance which were not noted in the dismissal letter. They are as follows:

A. On July 16, 1983, Rodriguez gave Dees a work assignment which was inconsistent with instructions given by leadworker, Tonte Sarmiento. The assignment was impossible and unsafe, and it violated established policy which was that assignments were to come from the leadworkers.

B. On November 11, 1983, Rodriguez wrote a memo stating that he and Mario Ruiz could not work with Dees. The memo falsely claimed that Dees refused to accept any form of communication from Rodriguez or Ruiz. Rodriguez also requested that Dees be placed on leave.

C. On November 16, 1983, Dees received a disciplinary letter from Vice President Robert Kennelly. The letter was delivered to Dees' home by his co-workers. (The letter

evidently had something to do with Dees' leave status; Dees objects to both its contents and its delivery.)

While the three allegations appear to be untimely, all were arguably tolled[6] by their inclusion in Dees' various

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[6]The doctrine of equitable tolling was embraced by the Board in State of California, Department of Water Resources et al. (1981) PERB Order No. Ad-122-S. The statute of limitations is tolled by efforts to use a grievance procedure and begins to run again when a final decision on the grievance is reached. See Los Angeles Unified School District (Siamis) (1983) PERB Decision No. 311.

The dissent fundamentally disagrees with the Board's authority to apply the principle of equitable tolling. It argues that section 3563.2(a) imposes a jurisdictional limitation on the Board's ability to issue a complaint. We disagree. The Board has the authority to determine and, by regulation and case law (see cites at p. 27 of dissent), has consistently found that the language of EERA section 3541.5(a)(2), SEERA section 3514.5(a)(2) and HEERA section 3563.2(a) setting forth the six-month statute of limitations is not jurisdictional. The theory, simply put, is that PERB is a constitutional agency empowered by the Legislature to exercise judicial functions to effectuate the purposes of the statutes entrusted to it (cf. Perry Farms, Inc. v. Agricultural Labor Relations Board (1978) 86 Cal.App.3d 448 and Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 197, fn. 19). Its interpretation of section 3563.2(a) allowing for equitable tolling best effectuates the intent of the Legislature in promulgating HEERA.

The dissent acknowledges that "shall" has been held in some cases to be directory rather than mandatory (Pappadatos v. Superior Court (1930) 209 Cal. 334, 335). Whether the language should be construed as mandatory or directory depends on the intention of the Legislature in enacting the section. Estate of Mitchell (1942) 20 C.2d 48, 51. In the application of the statute of limitations language under EERA, SEERA and HEERA, the Board is directed by the Legislature to refuse to issue complaints that arise more than six months prior to filing, but that requirement may be waived if not timely asserted, or it may be tolled following the standards set forth in San Diguito Union High School District (1982) PERB Decision No. 194. Any other construction

> might well operate to discourage bilateral dispute resolution. Grievants would be

grievances. Allegation A was included in Dees' July 28, 1983 grievance and reappeared in his April 16, 1984 level III grievance. The history of the July 28, 1983 grievance and its relationship to the April 16, 1984 grievance are unclear. Apparently, the April 16, 1984 grievance was still pending at the time Dees' original charge was filed. Whether the allegation was the subject of a grievance continuously from July 28, 1983 forward (and thus tolled) cannot be determined from the record before us. Allegations B and C were included in Dees' April 16, 1984 level III grievance. Assuming this grievance was indeed pending when the original charge was filed, the statute of limitations was tolled.

Nevertheless, if allegations A, B and C fail to state prima facie cases, their timeliness need not be decided. To state a prima facie case of reprisal, charging parties must allege facts sufficient to raise the inference that their exercise of rights guaranteed by the HEERA was a motivating factor in the

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> forced to file unfair practice charges in the first instance in order to protect their right to access to PERB. Voluntary resolution would be replaced by litigiousness. State of California, Department of Water Resources et al., supra.

Similar language in the National Labor Relations Act has long been considered not to be jurisdictional (see NLRB v. Vitronic Division of Penn Corp. (CA 8 1979) 630 F.2d 561 [102 LRRM 2753] and cases cited therein). The principle of equitable tolling has been approved and adopted in cases adjudicating disputes under each of the statutes administered by PERB, and there is no need here to reargue or relitigate those cases.

employer's decision to engage in the conduct complained of. California State University, Sacramento (1982) PERB Decision No. 211-H. To establish this "nexus" between the protected activity and the complained-of conduct, charging parties must allege that the employer had knowledge of the protected activity, plus some other factor supporting the inference of unlawful motive. The most common of such factors are the timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, the employer's departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions. Novato Unified School District (1982) PERB Decision No. 210.

The incident described in Allegation A took place on July 16, 1983, within six weeks after Dees had filed his first two grievances, and less than a month after Dees prevailed in his June 3, 1983 grievance (on or about June 20, 1983). The work assignment was allegedly adverse in that it was impossible and unsafe, and it allegedly violated the existing policy on assignments. This, on its face, is enough to constitute a prima facie case. The sufficiency of allegations B and C cannot be accurately evaluated without reviewing the contents of the Rodriguez and Kennelly documents, which are not in the record before us.

In sum, remand to the general counsel is necessary to determine if the statute of limitations was arguably tolled as to the three allegations and, if so, to determine if allegations B and C state prima facie violations of the Act.

The Allegations Dismissed as Untimely

The general counsel dismissed allegations 1, 2, 3, 4, 7, 9 and 10 above because they occurred more than six months prior to the filing of Dees' original charge. The dismissal letter made no mention of tolling, and Dees' appeal raises this issue.

Allegation 1 concerns allegedly unwarranted personal surveillance (constituting harassment) of Dees by supervisor Rodriguez, covering a period from approximately June 7, 1983 to approximately October 18, 1983, when Dees left work on a medical leave. This entire period is indeed outside the statute of limitations (charge filed May 21, 1984). The allegation does not appear to be the subject of a grievance until April 16, 1984. However, as noted above, the April 16, 1984 grievance was at level III. It is not clear from the record if it was initiated at that level or was filed earlier at level I or II, or if tolling began earlier due to activities in preparation for the April 16, 1984 grievance. Further investigation is necessary to determine when tolling arguably began and whether the allegation includes acts within the expanded limitations period.

Allegations 2 and 3, like allegation A above, appeared first in Dees' July 28, 1983 grievance and later in his

April 16, 1984 grievance. Once again, because the history of these two grievances and their relationship to each other are unclear, further investigation is required to determine the timeliness of allegations 2 and 3.

The need for remand as to allegations 1, *2* and 3 is not obviated by further analysis of their sufficiency, as all three state prima facie violations. Identifiable protected activity within the knowledge of the alleged perpetrators is reflected by Dees' June 3, 1983 grievance (in which he prevailed on June 20, 1983), and all three actions purportedly taken in reprisal were indeed adverse and were close enough in time (all took place, at least in part, before the end of June 1983) to the protected activity to raise an inference of unlawful motive.

Allegation 4 alleges that Laverne Diggs walked out of an October 11, 1983 grievance meeting while Dees was still providing testimony. This allegation, like allegation 1, was not the subject of a grievance until April 16, 1984. It is thus untimely unless, upon remand, further investigation reveals that the limitations period was arguably tolled prior to April 16, 1984 (more specifically, April 11 or earlier).

The allegation is otherwise sufficient to state a prima facie case. Though the general counsel couched the allegation as one of reprisal, it may also be viewed simply as an allegation of interference with protected rights. The presentation of grievances is a protected right under the Act.

See The Regents of the University of California (Berkeley) (1983) PERB Decision No. 308-H. Assuming it is true that Diggs walked out of the grievance meeting while Dees was still making his presentation, her action arguably caused some harm to this protected right. Such a showing of possible harm is adequate to state a prima facie case of interference with, or denial of, protected rights. See Novato, supra.

Based upon the record, allegation 7 appears to be incorrectly stated in the dismissal letter. The amended charge and Dees' April 16, 1984 grievance state that he was officially placed on AWOL (absent without leave) time, not sick leave, on October 26, 1983. The record reflects that Dees filed a grievance over the AWOL time on November 3, 1983, which he won at level II on or about January 11, 1984. The AWOL issue is covered by allegation 6, on which a complaint did issue, and need not be further addressed here.

The timing of the conduct described in the remaining part of allegation 7, i.e., that Respondent forced Dees to remain on medical leave despite his doctor's letters attesting to his fitness to work, is unclear, though presumably it occurred sometime after October 18, 1983, when Dees first went on medical leave. This allegation does not appear in any of Dees' grievances, nor is there any other basis reflected in the record for tolling the limitation period. Thus, to be timely, the adverse action must have taken place on November 21, 1983 or later. The record before us is inadequate to determine the

timing of the conduct described in allegation 7; thus, remand is appropriate. Because we are unable to fix the time of the alleged adverse action, we are unable to determine if it was close enough in time to constitute a sufficient nexus between the adverse action and the protected activity. We are also unable to determine from the record if Respondent's action arguably violated established policies or if any other factor was present which provides a sufficient nexus. See Novato, supra. Consequently, if the allegation is timely, further investigation would also be necessary to determine if a prima facie violation is stated.

The incidents included in allegations 9 and 10, both occurring on November 10, 1983, were subjects of Dees' April 16, 1984 grievance. Thus, the statute of limitations was tolled at least as of that date forward, making these allegations timely. The nature of the acts alleged in allegation 9, in conjunction with CSUH's knowledge of Charging Party's protected activities and occurring relatively soon after a string of such activities by Dees (the latest being his November 3, 1983 grievance), do constitute a prima facie case. Therefore, we shall order that allegation 9 be added to the pending complaint. Allegation 10, which states only that Dees was placed on medical leave by his physician, is merely evidence of damage suffered due to the acts alleged in allegation 9 (or earlier acts). No additional acts of Respondent are alleged; thus, no additional violation is

alleged. Therefore, we shall affirm the dismissal of allegation 10.

The Allegations Dismissed for Failure to State a Prima Facie Case

For the reasons that follow, we affirm the dismissal of allegations 8, 11, 12, 13 and 14 for failure to state a prima facie violation.

Assuming that Respondent had knowledge of Dees' various protected activities, we find that Charging Party failed to allege any additional factors sufficient to reflect a nexus between these activities and the complained-of conduct. Thus, no inference of unlawful motive is raised by these allegations and no prima facie violations are stated.

In allegation 8, the requests for verification of Dees' medical status appear to coincide with his various medical leaves (the October date should be the 21st, not the 12th).[7] Dees did not allege that these requests reflected disparate treatment or a departure from established procedures. Further, the general counsel's investigation revealed that the requests were apparently consistent with established practice. Allegations 12 and 14 fail for the same reasons.

[7]While Dees alleged that he continued to receive requests for verification up until the time of the filing of his charge, he specifically mentioned only the three requests listed by the general counsel and made no allegations concerning the timing or circumstances surrounding any subsequent requests.

Allegation 11 merely alleges that CSUH sent two letters containing different times for a scheduled meeting. Though they were postmarked on different dates, they apparently arrived on the same day, confusing Dees as to the proper time of the meeting. These facts, even if taken as true, do not reflect any action taken against Dees in reprisal, and Dees failed to allege any additional facts that would shine a different light on circumstances that were more than likely out of the control of CSUH or, at worst, the result of an innocent mistake. Further, the date of the meeting was clarified as soon as Dees' attorney called to inquire about the correct date. As alleged, these facts simply are not susceptible to an interpretation reflecting an unlawful motive.

Allegation 13 is based upon an alleged refusal to meet with Charging Party and his representative at a scheduled time (December 22, 1983). We note that the general counsel's investigation revealed the uncontested fact that the meeting was rescheduled shortly thereafter, and that the grievance was resolved by January 11, 1984, in part in Dees' favor. This fact demonstrates that, if viewed as an interference-type violation, the harm from the delay of the meeting was de minimus. If viewed as a reprisal, the facts are insufficient to raise an inference that the delay was due to unlawful considerations.

II. SECOND FILING: APPEAL OF A PARTIAL REFUSAL TO ISSUE A COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE

On November 14, 1984, Dees went to hearing on the complaint issued by the regional attorney. Dees made and was granted a motion to postpone the hearing on the complaint until his appeal of partial dismissal of his first amended charge was heard and a decision rendered. In the meantime, Dees and the University continued to fight about his job assignment and his employment status. Dees did not return to work and refused to change his status to unpaid leave. On May 29, 1985, CSUH informed Dees that he had been terminated.

In June 1985, Dees went to the regional attorney with a stack of papers, including the May termination letter. The regional attorney reviewed the file and informed Dees that he did not have a new charge but that he had additional facts (the termination) that he could submit in the form of an amendment to his original charge. In June 1986, the regional attorney issued a first amended complaint, adding the termination to the transfer and other allegations of discriminatory treatment in the original complaint. The regional attorney dismissed all the other allegations in the second amended charge because they did "not support a prima facie violation of HEERA, independent of that contained in the pending complaint, or add facts to further substantiate allegations of the pending complaint."[8]

[8]Letter of regional attorney. Partial Refusal to Issue Complaint and Dismissal of Unfair Practice Charge. Tommie R. Dees v. California State University, Hayward, Case No. SF-CE-192-H.

On June 30, 1986, Dees filed this appeal of the regional attorney's partial refusal to issue a complaint and dismissal of the second amended charge.

DISCUSSION

We have reviewed the partial refusal to issue a complaint and dismissal of unfair practice charge and, finding it free from prejudicial error, adopt it as the decision of the Board.

ORDER

I. PARTIAL DISMISSAL OF THE FIRST AMENDED UNFAIR PRACTICE CHARGE

Charging Party's request for assistance pursuant to PERB Regulation 32163 is hereby DENIED.

Consistent with the above discussion, allegations A, 1, 2, 3 and 4 are REMANDED to the general counsel with instructions to determine if the limitations period was arguably tolled so as to make the allegations timely.

Consistent with the above discussion, allegations B and C are REMANDED to the general counsel with instructions to determine if the limitations period was arguably tolled so as to make the allegations timely and, if so, to determine if said allegations state prima facie violations of HEERA.

Consistent with the above discussion, allegation 7 is REMANDED to the general counsel with instructions to determine if said allegation is timely and, if so, to determine if a prima facie violation is stated.

The dismissal of allegations 8, 10, 11, 12, 13 and 14 is AFFIRMED with prejudice.

Allegation 9 is REMANDED to the general counsel with instructions to add it to the complaint pending in the case herein.

II. PARTIAL REFUSAL TO ISSUE A COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE

The second amended unfair practice charge is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Burt joined in this Decision. Member Porter's concurrence and dissent begins on p. 24.

Porter, Member, concurring and dissenting: I concur with the majority opinion's dismissal of allegation 8 on the ground that it lacks a prima facie basis. I would additionally find this allegation not timely filed.[1] With respect to allegation 10, I concur with the majority in its result of affirming the general counsel's dismissal. However, because I cannot accept the theory of equitable tolling under HEERA, I disassociate myself from the majority's discussion of that doctrine and would instead find this allegation not timely filed. I concur in the majority's dismissal of allegations 11, 12, 13 and 14 on the ground that they lack a prima facie basis.

Because I construe HEERA section 3563.2(a) as prescribing a jurisdictional limitation on the Board's authority to issue a complaint on events occurring outside the six-month period designated in that provision, I respectfully dissent from the majority's remand of allegations 1, 2, 3, 4 and 7. With respect to allegation 9, I dissent from the majority's issuance of a complaint inasmuch as this allegation is clearly outside the jurisdictional time period prescribed in HEERA section 3563.2(a).[2] For the same reason, I dissent from the majority's

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[1]The underlying unfair practice charge was filed by Dees on May 21, 1984. Therefore, any adverse action taken by the University against Dees would have to have occurred on or after November 21, 1983, or else be barred pursuant to the six-month jurisdictional period designated in HEERA section 3563.2(a). See fn. 5, infra.

[2]I also note that the majority's analysis of whether there is a prima facie case appears to establish a basis of nexus

decision to remand newly identified allegations A,[3] B and C to the general counsel for exploration of the issue of equitable tolling and, assuming that the charges are found to be timely filed under an application of the doctrine, whether or not they state a prima facie case.

I recognize that the majority opinion's application of the doctrine of equitable tolling follows Board precedent. State of California, Department of Water Resources et al. (1981) PERB Order No. Ad 122-S; San Dieguito Union High School District (1982) PERB Decision No. 194; Regents of the University of California (1983) PERB Decision No. 353-H. See also PERB Regulation 32646(a).[4] However, inasmuch as an application of equitable tolling is clearly inconsistent with the proscription placed directly on the Board under all three statutes that PERB

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solely on consideration of timing. However, timing alone will not constitute a nexus under our precedent. Charter Oak Unified School District (1984) PERB Decision No. 404.

3With respect to allegation A, the majority again appears to establish nexus solely on the basis of timing. I again note that such a determination is inconsistent with Board precedent. See fn. 2, supra.

[4]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

Regulation 32646(a) provides, in pertinent part:

> If the respondent believes that issuance of the complaint is inappropriate either because the dispute is subject to final and binding arbitration, or because the charge is untimely, the respondent shall assert such a defense in its answer and shall move to dismiss the complaint, . . .

administers,[5] I believe that this Board may not apply equitable tolling under either the Educational Employment Relations Act (EERA), the State Employer-Employee Relations Act (SEERA) or the Higher Education Employer-Employee Relations Act (HEERA). The immediate controversy, of course, arose only under HEERA. In this respect, the majority opinion errs in applying the doctrine of equitable tolling under HEERA in order to permit the issuance of an unfair practice complaint based on an alleged practice occurring more than six months before the filing of the charge.

The doctrine of equitable tolling was adopted by the Board in State of California, Department of Water Resources et al., supra. In Department of Water Resources, the Board held that it was appropriate for the doctrine of equitable tolling to be applied in those instances in which an unfair practice charge had been

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5EERA section 3541.5(a) and SEERA section 3514.5(a) provide, in pertinent part:

> Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge, . . . (Emphasis added.)

HEERA section 3563.2(a) provides:

> Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge, . . . (Emphasis added.)

filed more than six months after the alleged violation of SEERA and the issues raised by the charge had been pursued by appeal to the State Personnel Board or through the parties' grievance procedure, whether or not negotiated. In embracing the doctrine, the Board rejected the respondent's argument that SEERA's statutory provision requiring deferral to the parties' negotiated grievance procedure, if existent, was the exclusive means by which the "limitations period" could be tolled. To the contrary, the Board asserted that, while SEERA section 3514.5(a)(2) contains its own internal tolling provision, the latter does not preclude the Board from finding alternative and additional grounds for tolling the six-month period designated in the statute. Equitable tolling was extended to unfair practice charges arising under the EERA in San Dieguito Union High School District, supra, and to those under the HEERA in Regents of the University of California, supra.

The doctrine of equitable tolling, as was first enunciated in Department of Water Resources, supra, has since been distilled by Board precedent to require that two criteria be met before the doctrine is deemed appropriately applicable. First, it is necessary that tolling in the particular instance not frustrate achievement of the purpose underlying a statute of limitations, which is to prevent "surprises through revival of claims that have been lost, memories that have faded, and witnesses that have disappeared." San Dieguito Union High School District, supra, citing Elkins v. Derby (1974) 12 Cal.3d 410. Second, the

responding party cannot be prejudiced by an application of the doctrine of equitable tolling. San Dieguito Union High School District, supra.

In San Dieguito Union High School District, the Board misplaced its reliance on considerations used to justify tolling a statute of limitations within the context of a tort cause of action. Unlike the typical litigants in tort, parties in public sector labor disputes are necessarily involved in an ongoing relationship. Extending the time during which an unfair practice charge can be filed prolongs the disruption and destabilization of that relationship and thereby becomes antithetical to what is perhaps the preeminent goal of the statutes that this Board administers: to promote the improvement of harmonious employer-employee relations. (HEERA secs. 3560(a) and (d).)

Moreover, conspicuously absent in any of the Board decisions in which the concept of equitable tolling has been considered is reasoned analysis of the effect of the prohibitory language found in EERA section 3541.5(a), SEERA section 3514.5(a) and HEERA section 3563.2(a). Since the immediate controversy is limited to HEERA, the focus of the discussion will be on the language of section 3563.2(a) of that statute.

Section 3563.2(a) of HEERA reads as follows:

> Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Emphasis added.)

Perhaps the most fundamental rule of statutory construction is for laws to be given effect "according to the usual ordinary import of the language employed in framing them." Rich v. State Board of Optometry (1965) 235 Cal.App.2d 591, 604, hrg. denied. If the words of a statute are clear, its language should not be added to or altered in order to accomplish a purpose that does not appear on the face of the statute or from its legislative history. People v. Knowles (1950) 35 Cal.2d 175, 182. Nor is it appropriate, when analyzing the language of a statute, to insert or add words to the law to reflect the existence of an alternative legislative intent that is not expressed in the words of the statute. Service Employees International Union v. City of Santa Barbara (1981) 125 Cal.App.3d 459, 467, hrg. denied.

The language of section 3563.2(a) is clear and unambiguous. Furthermore, the proscription of HEERA section 3563.2(a) is directed to the Board and not to the parties. It is not a statute of limitations in the traditional sense; it instead defines the parameters of this Board's jurisdiction.[6] In so doing, it

[6]The majority, in advancing its argument that this Board should continue to adhere to the principle of equitable tolling, asserts that "[s]imilar language in the NLRA has long been considered not to be jurisdictional." (Majority Opn., pp. 12-13, fn. 6.) However, significant differences in language between HEERA section 3563.2(a) and section 10(b) of the National Labor Relations Act preclude this Board from deeming federal precedent to be dispositive of the issue of equitable tolling under the HEERA. (See 29 U.S.C, section 160(b).) Unlike HEERA section 3563.2(a), section 10(b) of the NLRA does not place a direct proscription on the NLRB's authority to issue a complaint based upon an alleged unfair practice occurring more than six months prior to the date at which the charge was filed.

unequivocally restricts the Board's authority to issue a complaint, and provides that the Board may not do so when more than six months have elapsed between the occurrence of the alleged unfair practice and a charge filed in relation thereto. Furthermore, it is clear from the language selected by the Legislature that it intended for the proscription of HEERA section 3563.2(a) to operate as a jurisdictional limitation on the Board's authority to act.

The Legislature's intent to impose a limit on this Board's authority to act is evidenced in its choice of words in section 3563.2(a), " . . . the Board shall not issue a complaint. . . ." (Emphasis added.) The courts customarily construe the word "shall" as being mandatory, while "may" is generally interpreted to describe permissive action on the part of a governmental entity. Government Code section 14; Fair v. Hernandez (1981) 116 Cal.App.3d 868, 878, hrg. denied; Hogya v. Superior Court, San Diego County (1977) 75 Cal.App.3d 122, 133, hrg. denied; REA Enterprises v. California Coastal Zone Commission (1975) 52 Cal.App.3d 596, 606, hrg. denied. In light of these authorities, it is entirely anomalous to argue that, while "shall" is interpreted by the courts to impose upon a governmental entity an affirmative duty to act, the words "shall not" may nonetheless be construed to confer discretion to act. Nonetheless, this is the result of assuming, as does the majority, that the theory of

equitable tolling is consistent with the statutory language of HEERA section 3563.2(a).[7]

The word "shall" appearing in a statute has additionally been interpreted by the courts as "mandatory" in the sense that a governmental entity's failure to comply with a particular procedural step will have the effect of invalidating a governmental action to which the procedural requirement relates. In such an instance, the procedural requirement is deemed jurisdictional. Garcia v. County Board of Education (1981) 123 Cal.App.3d 807, 811-813; People v. McGee (1977) 19 Cal.3d 948, 959; Edwards v. Steele (1979) 25 Cal.3d 406, 410. Under this doctrine, time provisions will be considered mandatory and jurisdictional "if the language contains negative words or shows that the designation of time was intended as a limitation of power, authority or right." Pulcifer v. County of Alameda (1946) 29 Cal.2d 258, 262. See also Napa Savings Bank v. Napa County (1911) 17 Cal.App. 545, 548, hrg. denied. By the Legislature's inclusion of the word "not" as modifying "shall," it clearly and definitively expressed its intention to limit the power of the

[7]Under special circumstances, in order to further the intent of the Legislature, the courts will depart from their customary rule of interpreting "shall" as obligatory and will instead construe it to denote permissive action only. See, e.g., People v. Superior Court for Santa Clara County (1970) 3 Cal.App.3d 476, disapproved on other grounds, 37 Cal.3d 318. There appears to be no authority for the proposition, however, that "shall not" can be interpreted to denote discretionary action. Therefore, while in some unique instances "shall" may mean "may," there is no authority illustrating the principle of "shall not" meaning "may." Shall not means shall not.

Board to issue a complaint under certain specified conditions, namely when a period greater than six months has elapsed between the occurrence of the alleged unfair practice and the party's filing of a charge.

The majority theorizes that PERB derives its power to apply equitable tolling from its status as a "constitutional agency empowered by the Legislature to exercise judicial functions to effectuate the purposes of the statutes entrusted to it," and cites Perry Farms, Inc. v. Agricultural Labor Relations Board (1978) 86 Cal.App.3d 448 for this proposition. (Majority Opn., p. 12, fn. 6). In Perry Farms, the court held that, under Article XIV, section 1 of the California Constitution,[8] the Legislature statutorily vested the ALRB with the judicial function of adjudicating and deciding unfair labor practice cases.

There are two inherent problems in connection with the majority opinion's theory. First of all, to date, there exists no precedent in which it has been found that PERB, like the ALRB, derives its adjudicatory power from the Constitution. In fact, in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 197, fn. 19, decided subsequent to Perry Farms, supra, the California Supreme Court expressly opted to leave for future determination

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[8]Article XIV, section 1, reads as follows:

> The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive and judicial powers.

the issue of whether PERB's adjudicatory power was of legislative or constitutional origin.

Moreover, the majority opinion's theory derives from a misinterpretation of Perry Farms. That decision did not hold that, by its vesting of the ALRB with adjudicatory power to decide unfair labor practice cases, the Legislature concurrently vested within that agency the sum total of judicial power. The California Constitution vests equity power and jurisdiction exclusively in the Superior and appellate courts. California Constitution, Article VI, section 10.

Similarly, while HEERA authorizes PERB to adjudicate unfair practice cases, such limited adjudicatory power is not tantamount to judicial power in its entirety. For example, while HEERA authorizes PERB to seek or petition the Superior Court for injunctive relief in certain unfair practice cases (HEERA section 3563(i)), PERB has no general equity power whereby it may itself grant injunctive relief. Thus, while both the ALRB and PERB are vested with limited adjudicatory power to decide unfair practice cases, neither agency is vested, either constitutionally or statutorily, with broad judicial equitable power which could properly embrace the doctrine of equitable tolling.

Nor can the doctrine of equitable tolling be justified as constituting a proper invocation of PERB's implied powers. Although administrative agencies may possess those powers intrinsically related to the achievement of their statutory mandates, such powers cannot be invoked where they are

incompatible with those expressly granted. Blatz Brewing Co. v. Collins (1945) 69 Cal.App.2d 639, 645, hrg. denied; 2 Cal.Jur.3d, p. 257. One may even more compelling argue that an administrative agency's implied power cannot be invoked where to do so is not merely incompatible with that expressly granted but with that expressly prohibited. See 62 Ops.Cal.Atty.Gen. 356 (1959); 34 Ops.Cal.Atty.Gen. 322 (1959).

As a general proposition, any application of equitable tolling is wholly inconsistent with HEERA's prohibitory language and, therefore, the Board may not apply the principle in order to extend its jurisdiction beyond that granted by the Legislature. Moreover, while in the instant case the majority opinion labels its theory "equitable tolling" as opposed to "statutory tolling" by its reliance on Dees' utilization of the parties' contractual grievance procedure, the majority's analysis parallels that inquiry properly made in applying principles of statutory tolling under EERA and SEERA.[9] This, in turn, violates the intent of the Legislature to omit statutory tolling from HEERA.

Within a context analogous to that of the instant case, in Regents of University of California v. Public Employment Relations

[9]Both EERA section 3541.5(a) and SEERA section 3514.5(a) contain the following language providing for statutory tolling:

> . . . The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

Board (1985) 168 Cal.App.3d 937, an attempt by PERB to imply from the language of HEERA a nonexclusive representative's right of representation was struck down. The court reasoned that approving PERB's interpretation would be tantamount to authorizing the Board to rewrite HEERA to suit its notion of what the Legislature must have intended to mean, despite the fact that its assumed intent was not expressed in the language of the statute. In rejecting the Board's interpretation, the court found strong evidence of contrary legislative intent, the most important of which was the Legislature's use of the same construction in four other statutes and its failure to use that construction under the HEERA. Id., at pp. 344-345. The message of the court in Regents of University of California was clearly expressed: "HEERA is significant not so much for what it provides as for what was omitted." Id., at p. 944.

Similarly, EERA section 3541.5(a) and SEERA section 3514.5(a) provide for statutory tolling; however, such a provision under the HEERA is conspicuously absent. Yet, the majority ignores this omission and, on these facts, effectively rewrites HEERA section 3563.2(a) to provide for statutory tolling. As a consequence of its interpretation, the majority opinion violates the intent of the Legislature to omit statutory tolling from the HEERA. Moreover, the majority also sanctions an interpretation of HEERA premised on the Board's action in excess of its authority in a manner found repugnant by the court in Regents of University of California.

As an administrative agency of limited jurisdiction, PERB possesses only those powers expressly conferred on it by statute or those that can fairly be implied. City and County of San Francisco v. Padilla (1972) 23 Cal.App.3d 388, 400, hrg. denied; Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal.App.3d 110, 114, hrg. denied.[10] If an administrative agency acts in excess of its authority or in violation of powers conferred upon it, its actions are void. City and County of San Francisco, supra, p. 400; Ferdig v. State Personnel Board (1969) 71 Cal.2d 96, 104; 2 Cal.Jur.3d, at p. 252. The doctrine of equitable tolling does not derive from either an express or implied power conferred on this Board under the HEERA. On the contrary, its application contravenes an express prohibition of HEERA. Consequently, in continuing to apply equitable tolling, the Board is proceeding outside its jurisdiction and, for this reason, I respectfully dissent from those portions of the majority opinion that rely on equitable tolling to vest this Board with jurisdiction to perform an act specifically proscribed by statute.

Finally, I join the majority in affirming the regional attorney's partial refusal to issue a complaint and dismissal of the second amended unfair practice charge.

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[10]Similarly, administrative rules and regulations may not exceed the scope of authority granted the agency in the relevant enabling legislation. Selby v. Department of Motor Vehicles (1980) 110 Cal.App.3d 470, 474-475; Morris v. Williams Health and Welfare Agency (1967) 67 Cal.2d 733, 737.